72-1478

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO. 72-1478

BELMER LEWIS WRIGHT, JR.

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1972

NO. _____

BELMER LEWIS WRIGHT, JR.

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BELMER LEWIS WRIGHT, JR., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause February 27, 1973, petition for rehearing denied March 28, 1973.

## REFERENCE TO OPINION BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit are not yet reported; a copy of each is appended hereto in Appendix, infra, pp. A and B.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was delivered February 27, 1973; timely filed motion for rehearing was denied March 28, 1973.

Jurisdiction to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether and by what standards the Fourth Amendment governs a search at a location other than a port of entry of a motor vehicle which has not been shown to have crossed any external boundary of the United States nor its occupants to have committed any suspicious act, by one whose duty as an immigration officer is to detect illegal entry of aliens and as a customs inspector to detect illegally imported merchandise.

2. Whether search of a motor vehicle and seizure of plastic wrapped bundles and their contents discovered in the vehicle by an immigration officer who did not have probable cause to believe that the vehicle contained contraband or illegally imported merchandise may be constitutionally upheld on standards other than mandated by the Fourth Amendment.

3. Whether the trial court erred in overruling motion to suppress evidence obtained as a result of stopping and searching a portion of a motor vehicle by an immigration officer under facts and circumstances in this case.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the person or things to be seized."

2. Title 8c. § 1357. Powers of immigration officers and employees — Powers without warrant.

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant —

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

* * *

(3) within a reasonable distance from any external boundary

of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

* * *

Search without warrant

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search.

3. 8 C.F.R. §287.1 Definitions.

(a) (1) *External boundary*. The term "external boundary," as used in section 287 (a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays, and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.

(2) *Reasonable distance*. The term "reasonable distance," as used in section 287 (a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director. . . .

* * *

## STATEMENT OF THE CASE

James W. Knight is an immigration officer employed by the United States Border Patrol in Laredo, Texas area. On May 8, 1972, he and his working partner set up "a *temporary*[1] checkpoint . . . to check for traffic in illegal aliens" on Interstate Highway 35 about eleven miles

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[1]All emphasis is supplied throughout by writer of petition unless other indicated.

north of Laredo.[2] With appropriate signs to direct movement of approaching vehicles, officers at the checkpoint nevertheless do not stop every vehicle if traffic is "real heavy" but will stop "just about everybody and ascertain their citizenship" if it is not. When not outside on or near the roadway, the officers are in a van off on the right of way.

On the occasion in question at about 11:15 a.m., Knight and his partner were in their van when he observed a blue 1971 Ford stationwagon approach the checkpoint. The vehicle slowed to and was rolling by the stop sign when Knight, acknowledging that "we should have been out of there a little bit quicker than we were," hollered "Hold it" and the vehicle stopped just a few feet past the sign.[3] Knight went around the rear of the vehicle and up to the driver's window; he observed the occupants more closely and, upon his inquiry, heard each say he was a United States citizen - a statement he had no reason to doubt.

Either as he was walking around the rear of the stationwagon or while interrogating its occupants, Knight noticed a tire up on top of "stuff" on the deck in the back of the vehicle. He asked the driver to get out and open the back door of the stationwagon. Wright did as requested.

With the back door opened and as he viewed the tire, Knight could not and did not know whether what he was seeing was actually the spare tire that normally might have been in the tire well but was not or what. At that time Knight was not familiar with a 1971 Ford stationwagon and, therefore, could not and did not know where a spare tire would normally be stowed. As he looked at the tire and "stuff," he saw a white cover material under it all that ran the full length and breadth of the deck or platform and, although he could surmise from seeing a button at the rear of the deck that a compartment was under the cover, Knight could not and did not know its dimensions, and could not and did not know if it were the spare tire well. As it turned out, the deck compartment is for back seats to fold down into — Knight could not tell from merely looking at

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[2]IH-35 is the main traffic artery from Laredo to points north in Texas and elsewhere; there is no other interstate highway out of Laredo. Obviously it is the route used by most travelers.

[3]This incident had absolutely no bearing whatsoever on his subsequent actions. Knight conceded to the trial court that "The only thing that aroused any suspicion in his mind was the fact that the spare tire was up, visible in the body part of the stationwagon."

the decking whether seats were properly in their places in the compartment -- and the spare tire well is in the right interior wall with a cover -- Knight does not remember whether the covering was in place.

Pushing back the tire and "stuff" and lifting up the white cover on the deck, Knight opened the compartment and immediately learned that it did not contain aliens. What he did see were plastic covered bundles wrapped heavily with silver duck tape and what he says he smelled was the odor of marihuana. Wrapped as they were, however, Knight was unable to view any other covering below the plastic and tape or the contents of the bundles. He promptly placed Petitioner under arrest.

## REASONS FOR ALLOWANCE OF WRIT

1.

The constitutional questions presented in this cause arise under the Fourth Amendment. Appellant contends for and the opinion of the Circuit Court rejects the proposition that authority sought to be bestowed by and exercised under 8 U.S.C. §1357(a)(3) is, in the circumstances of this case, at war with the rule laid down in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 285 (1925) that was reiterated in *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240 (1931) and in *Brinegar v. United States*, 338 U.S. 160, 176-177, 69 S.Ct. 1302, 1311 (1949). The precise issue is yet to be decided by the Supreme Court.

2.

The constitutional questions presented in this cause arise in a factual situation that is so similar to two other cases pending before the Supreme Court that disposition of one or the other may provide answers to our questions: *Almeida-Sanchez v. United States*, No. 71-6278, Petition for Certiorari granted May 22, 1972, 92 S.Ct. 2050, to review *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir., 1971) and *Bird v. United States*, No. 71-1240, Petition for Certiorari pending to review *United States v. Bird*, 456 F.2d 1025 (5th Cir., 1972). In *Almeida-Sanchez*, a stop and search for aliens under the rear seat of an automobile based on an information bulletin that aliens had recently adopted the practice of sitting up directly behind the backseat of an automobile with their feet and legs doubled up under

the rear cushion were upheld under 8 U.S.C. §1357 over a vigorous dissenting opinion. in *Bird* a stop and search of compartments large enough to conceal an alien were upheld in reliance upon *United States v. Maggard*, 451 F.2d 502 (5th Cir., 1971) in which immigration officers conceived the possibility of illegal aliens being transported from an observation that the rear of the automobile was riding low.

Granting the writ in *Almeida-Sanchez* indicates that the Supreme Court is impressed with the significant constitutional questions that are raised. That *Bird* still pends on petition for certiorari, presumably awaiting decision in *Almeida-Sanchez*, suggests that the similar questions it presents are likewise deemed significant.[4]

Thus, not only are substantial questions presented by this petition for writ of certiorari but also, being so closely akin to those raised in *Almeida-Sanchez* and *Bird*, answers to those questions are likely to be forthcoming without undue delay.

3.

As with the pending cases, the instant one is an appropriate vehicle for settling important questions of federal law implicating the Fourth Amendment. It directly presents for determination the meaning and extent of "border searches," the constitutional basis and scope of authority of an immigration officer to stop and search a motor vehicle for illegal aliens and then, finding none, the constitutional basis and scope of his claimed authority to act as a customs agent to search a compartment in the vehicle and inspect the wrapped containers and seize them and their contents.

[4]We are informed that *Almeida Sanchez* was submitted on oral argument concluded March 28, 1973, 41 L.W. 3536.

## CONCLUSION

For the reasons set forth above, petition for a writ of certiorari should be granted and on further hearing on the merits the opinion and judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and remanded for further proceedings.

Respectfully submitted,

Sam Houston Clinton, Jr.
CLINTON AND RICHARDS
600 West 7th Street
Austin, Texas 78701

ATTORNEY FOR PETITIONER

## CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for Respondent by depositing same in the United States mail, postage prepaid, addressed to Honorable Anthony J.P. Ferris, United States Attorney, Attention: Dan Alfaro, Assistant United States Attorney United States Post Office Bldg., Laredo, Texas 78040, and upon Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D.C. 20530, this day of April, 1973.

Sam Houston Clinton, Jr.

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 72-3137

Summary Calendar*

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BELMER LEWIS WRIGHT, JR.,

Defendant-Appellant.

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*Appeal from the United States District Court for the Southern District of Texas*

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(February 27, 1973)

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Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: On appeal from a conviction of possession with intent to distribute 319 pounds of marijuana, a violation of 21 U.S.C.A. § 841, Appellant Wright raises only one contention — that the search of his ve-

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

hicle which produced the voluminous quantities of the forbidden weed was violative of the guarantees of the Fourth Amendment, even under the broad "border search" rubric. We hold that the instant search falls well within the bounds of the border search doctrine and, accordingly, affirm.

Appellant and a female companion were stopped by agents of the Immigration and Naturalization Service at a point approximately 11 miles north of Laredo, Texas, and the Mexican border. According to the testimony of Immigration Officer James W. Knight, the officers' suspicions were somewhat aroused by the presence of a spare tire in the back of Appellant's 1971 Ford station wagon. This seemingly harmless factor was suspicious when viewed through the eyes of these officers because of their knowledge and experience that spare tire wells were often used to conceal aliens. Officer Knight requested the Appellant to open the rear door of the station wagon. Looking inside the vehicle, the Officer saw that the floor deck was covered by a white cloth. He pulled back the cloth and opened the rear seat compartment which was under it.[1] Officer Knight observed

[1]Actually the compartment was designed to hold the fold-down third rear seats. Being unfamiliar with the design on a 1971 Ford station wagon, Officer Knight did not know that this was not the spare tire well. Of course this simple factual mistake has no bearing on the validity of the search — Immigration agents are authorized by law to search any compartment where an unauthorized alien might be concealed. Thus, 8 U.S.C.A. § 1357(a)(3) gives immigration officers the authority:

"(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial

several large heavily wrapped, plastic covered bundles in this compartment. Detecting an odor of marijuana, he promptly placed the Appellant under arrest. Upon further inspection it was determined that the bundles contained the marijuana.

It is a well-settled principle of law in this Circuit that Immigration Officers may search any vehicle which they have a reasonable suspicion to believe may contain aliens. *United States v. McDaniel*, 5 Cir., 1972, 463 F.2d 129; *United States v. De Leon*, 5 Cir., 1972, 462 F.2d 170; *United States v. Maggard*, 5 Cir., 1971, 451 F.2d 502; *United States v. Bird*, 5 Cir., 1972, 456 F.2d 1023. The test is not one of probable cause, but "reasonable suspicion". "In substance, the term 'border search' is merely a short-hand method of stating that a search is, under the circumstances, a 'reasonable' stretch of the usual Fourth Amendment standard of 'probable cause' because of the proximity of an international frontier and other attendant factors." *McDaniel, supra* at 132.

In his excellent brief on appeal, Appellant seeks to distinguish *McDaniel* on several grounds. First, he suggests that because the internal check point herein was merely a temporary one rather than the permanent one in *McDaniel* there is less of a right to search. We fail to see the logic in this distinction, for, as we have stat-

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waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States."

ed, the Immigration Officers are authorized by statute and regulation to search at any point within a "reasonable distance"[2] from the border line. The effectiveness of the Border Patrol would be greatly diminished if the law required them to become creatures of their own habit.

Appellant also suggests that *McDaniel* requires "something more than just the stop before approving a search for aliens." Under *McDaniel*, a border search for aliens may be conducted if, in light of all the apparent facts at the time, government agents have adequate grounds for a reasonable suspicion that illegal aliens may be concealed within the vehicle, *United States v. McDaniel*, supra, at 133. In this case, Officer Knight's observation of a spare tire in the luggage compartment of the station wagon coupled with his knowledge that spare tire wells were often used to conceal aliens, justified his decision to open the rear compartment.

While the Immigration Officers are powerless to search bound bags too small to conceal aliens under the auspices of their immigration badges, the Court below found, as in *McDaniel, supra*, that Agent Knight and his partner had two badges — they were not only

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[2] "The term 'reasonable distance,' as used in [8 U.S.C.A. § 1357(a)(3)] of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the District Director." 8 C.F.R. § 287.1(a)(2). Of course mere presence within the hundred mile limit of the border does not, without more, justify all searches. See Carroll v. United States, 1925, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543, 552; Marsh v. United States, 5 Cir., 1965, 344 F.2d 317, 324.

agents of the Immigration and Naturalization Service, but were also authorized Customs Officers. As such, they are authorized to search any package which they may have a reasonable suspicion to believe contains merchandise which was imported contrary to law.[3] Thus, it was perfectly permissible for the Agents to convert what began as a search for aliens into a detailed search for contraband. *McDaniel, supra* at 134.

AFFIRMED.

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[3]In order to foreclose the possibility that any wolf could slip by the border in sheep's clothing, Congress has granted extensive authority to the Customs Agents for the search of vehicles, beasts and persons:

> "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

19 U.S.C.A. § 482. See also 19 U.S.C.A. § 1581; United States v. Caraway & Scales, 5 Cir. 1973, ——— F.2d ——— [No. 72-2198, January 15, 1973].

APPENDIX B

IN THE

# United States Court of Appeals

## FOR THE FIFTH CIRCUIT

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**No. 72-3137**
**Summary Calendar***

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**UNITED STATES OF AMERICA,**
**Plaintiff-Appellee,**

**versus**

**BELMER LEWIS WRIGHT, JR.,**
**Defendant-Appellant.**

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*Appeal from the United States District Court for the Southern District of Texas*

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ON PETITION FOR REHEARING

(March 28, 1973)

BEFORE BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1478

BELMER LEWIS WRIGHT, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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The question is whether in the circumstances of this case a search and seizure by an immigration and customs officer violated the Fourth Amendment.

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner (together with Elizabeth Clare Farmer) was convicted of having possessed 319 pounds of marihuana, with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment to be followed by a special parole term of three years. The court of appeals affirmed on February 27, 1973 (Pet. App. A), and denied a petition for rehearing on March 28, 1973 (Pet. App. B). The petition for a writ of certiorari was filed on May 1, 1973, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

Petitioner contends here that the marihuana admitted in evidence at trial was seized as a result of an unconstitutional search of his automobile. The evidence,[1] which is not in dispute, showed that on May 8, 1972, at approximately 11:15 a.m., a blue 1971 Ford station wagon, driven by petitioner, with co-defendant Farmer as a passenger, was stopped at a temporary Border Patrol checkpoint 11 miles north of Laredo, Texas (and the Mexican border) on Interstate Highway 35 (Tr. 6-9). The checkpoint, which had traffic signs, about fifteen cones directing traffic to the side of the road, a stop sign, and a stop light, had been set up by Border Patrolman James W. Knight and his partner to check for traffic in illegal aliens (Tr. 6-7). After asking petitioner and his companion if they were both United States citizens, Officer Knight saw that a spare tire was lying on top of some luggage or other items in the rear of the wagon. This aroused the officers' suspicion because of their knowledge and experience that spare tire wells are often used to conceal aliens. Accordingly, Officer Knight asked petitioner to open the rear door of the station wagon (Tr. 9-10). As he looked inside the vehicle, the officer saw that the floor was covered by a white cloth. He pulled back the cloth and opened the rear seat compartment in the floor (which he thought was the spare tire well). He observed several large, heavily wrapped, plastic bundles and immediately smelled the odor of marihuana (Tr. 11-13). Petitioner was placed under arrest and the bags of marihuana were seized (Tr. 13).

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[1] By agreement, the evidence was taken before the trial court both for the purpose of determining the motion to suppress and upon the merits. Citations to the transcript of those proceedings are hereinafter designated "Tr."

Petitioner argues that the stop and search of his automobile violated his rights under the Fourth Amendment. In *Almeida-Sanchez* v. *United States*, No 71-6278, decided June 21, 1973, this Court invalidated, on Fourth Amendment grounds, the roving search of automobiles at random, conducted 25 miles from the Mexican border, on a road which at no point is less than 20 miles from the international boundary. As Mr. Justice Powell pointed out in his concurring opinion, however, that ruling did not "involve the constitutional propriety of searches at permanent or temporary check points removed from the border or its functional equivalent" (slip op. at 2). See, also, *United States* v. *McDaniel*, 463 F. 2d 129 (C.A. 5), certiorari denied, No. 72-84, June 25, 1973 (upholding as lawful a search of an automobile for aliens at a permanent border patrol checkpoint); *United States* v. *Bird*, 456 F. 2d 1023 (C.A. 5), certiorari denied, No. 71-1240, June 25, 1973 (upholding a search for aliens at a temporary checkpoint located on the same road only three miles from the checkpoint in this case). The search here took place at such a temporary checkpoint only about 11 miles from the border. This case thus involved a reasonable border patrol law enforcement practice, rather than the kind of random, roving search at a substantial distance from the border which this Court condemned in *Almeida-Sanchez*.[2]

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[2] In any event, there is no reason why *Almeida-Sanchez* should be applied retroactively to the instant case, since that decision affects neither the "'fair determination' of * * * guilt or innocence" (*Roberts* v. *Russell*, 392 U.S. 293, 294), nor the "integrity of the fact-finding process" (*Linkletter* v. *Walker*, 381 U.S. 618, 639). See *Linkletter* v. *Walker*, *supra*, 381 U.S. at 636-637. See also *Michigan* v. *Payne*, No. 71-1005, decided May 21, 1973; *McConnell* v. *Rhay*, 393 U.S. 2, 3; *Gosa* v. *Mayden*, No. 71-6314, decided June 25, 1973. This Court has held that decisions involving

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JULY 1973.

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the Fourth Amendment exclusionary rule are not retroactive. *E.g., Linkletter* v. *Walker, supra*; *Williams* v. *United States*, 401 U.S. 646; *Desist* v. *United States*, 394 U.S. 244. There is no reason to depart from that rule here.